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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Allison Brenneise and Robert Brenneise, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant.	Case No. 08 CV 0028 WQH WMc (Consolidated with 08 CV 00039 WQH WMc) **DEFENDANT SAN DIEGO UNIFIED SCHOOL DISTRICT'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT**
SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff, v. T.B., a minor, Allison Brenneise and Robert Brenneise, his parents, Steven Wyner, and Wyner and Tiffany, Defendants.	

COMES NOW Defendant San Diego Unified School District ("District" or "Defendant") and answers Plaintiffs T.B., Allison Brenneise and Robert Brenneise's Amended

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Complaint ("Amended Complaint") as follows:

1. In response to paragraph 1, Defendant admits that Plaintiffs' First and Second Claims for Relief are brought pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), but denies that the Fourth Claim for Relief is brought pursuant to the IDEA. Except as admitted herein, Defendant denies any remaining allegation contained in paragraph 1 of the Amended Complaint.

2. In response to paragraph 2, Defendant admits that Plaintiffs' First Claim for Relief is to challenge the decision reached in a due process hearing convened pursuant to the IDEA, and that such claim is within the jurisdiction of the federal court pursuant to 28 U.S.C. section 1331 and 20 U.S.C. section 1415(i)(3)(A). Defendant denies that this Court has jurisdiction over issues or contentions that are not part of the administrative record or are or beyond the scope of the issues established for hearing. Defendant denies there are any pendent state law claims for which this Court would have supplemental jurisdiction pursuant to 28 U.S.C. 1367. Except as admitted herein, Defendant denies any remaining allegation contained in paragraph 2 of the Amended Complaint.

3. In response to paragraph 3, Defendant admits that it is located within the County of San Diego, in the Southern District of California and that at least a substantial part of the events that are the subject of the Amended Complaint took place within the Southern District of California. Defendant admits that venue is proper to the extent the Court has jurisdiction over the Amended Complaint. Except as admitted herein, defendant denies each and every allegation contained in paragraph 3 of the Amended Complaint.

4. In response to paragraph 4, Defendant admits the original Complaint filed was timely under California Education Code § 56505(k). Except as admitted herein, defendant denies each and every allegation contained in paragraph 4 of the Amended Complaint.

5. In response to paragraph 5, Defendant denies Plaintiffs have exhausted their administrative remedies as to all claims contained in their Amended Complaint. Defendant denies that Plaintiffs' should be excused from further exhaustion. Defendant denies that further exhaustion would be futile. Defendant denies each and every allegation contained in paragraph

5 of the Amended Complaint.

6. In response to paragraph 6, Defendant is informed and believes that Plaintiff T.B. is a citizen of the United States who resided in the County of San Diego with his parents, Plaintiffs Robert and Allison Brenneise, within the boundaries of the attendance area of the San Diego Unified School District, at the time of the events raised in the due process proceeding. Defendant is informed and beliefs Plaintiffs no longer reside in California and denies Plaintiff T.B. continues to reside within the boundaries of the attendance area of the San Diego Unified School District on this basis. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 6.

7. In response to paragraph 7, Defendant is informed and believes that Allison Brenneise is T.B.'s mother, that Robert Brenneise is T.B.'s father, and that both Robert and Allison Brenneise are citizens of the Unites States who resided in the County of San Diego, within the boundaries of the attendance area of the San Diego Unified School District, during the time the events raised in the due process proceeding occurred. Defendant denies that they continue to reside within the District's attendance boundaries. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 7.

8. In response to paragraph 8, Defendant admits it is a public school district organized and existing under the laws of the State of California, and located in San Diego County. Defendant admits it was the "local educational agency" (LEA) for T.B. under the IDEA pursuant to section 1401(19)(A) of Title 20 of the United States Code during the time the events raised in the due process proceeding occurred. Defendant denies being T.B.'s current LEA under section 1401(19)(A) since T.B. withdrew from San Diego Unified School District on March 7, 2008. Defendant admits it had a duty to provide T.B. with a free, appropriate public education ("FAPE") under the IDEA and the California Education Code when T.B. resided within the District, and that it did provide T.B. with free, appropriate public education. Defendant admits it receives federal financial assistance under the IDEA. Defendant lacks sufficient information or belief as to what Plaintiff considers to be "public education programs and activities [SDUSD] offers in compliance with the requirements of state and federal law," or

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which state and federal laws Plaintiff is referring to in paragraph 8 other than the IDEA and implementing California Education Code sections, and on that basis denies the allegation that it was "responsible for providing Student with full and equal access" to those programs and activities. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 8.

9. In response to paragraph 9, Defendant admits it filed a request for due process hearing with the California Office of Administrative Hearings (OAH) on or about November 29, 2006 through counsel, Elizabeth Estes and Sarah Sutherland, of Miller Brown & Dannis. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 9.

10. In response to paragraph 10, Defendant admits OAH issued a Notice of Due Process Hearing and Mediation on or about December 1, 2006 in the matter of *San Diego Unified School District v. T.B.*, OAH Case No. N200612002, setting a hearing for December 29, 2006. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 10.

11. In response to paragraph 11, Defendant admits it filed a Motion to Amend and Amended Due Process Request on or about December 15, 2006. Defendant admits OAH granted the motion on or about January 9, 2007. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 11.

12. In response to paragraph 12, Defendant admits Plaintiffs T.B. and his parents filed a request for due process with OAH along with a motion to consolidate, motion to vacate, and set a trial setting conference on or about January 29, 2007. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 12.

13. In response to paragraph 13, Defendant admits OAH issued a Notice of Due Process Hearing and Mediation in the matter of *T.B. v. San Diego Unified School District*, OAH Case No. N2007010848. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 13.

14. In response to paragraph 14, Defendant admits that OAH issued an Order

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granting student's request for consolidation on or about February 5, 2007. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 14.

15. In response to paragraph 15, Defendant admits that OAH issued an order setting the due process hearing in the consolidated cases for May 14-18, May 21-25 and May 29-June 1, 2007 and the telephonic Prehearing Conference for April 26, 2007. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 15.

16. In response to paragraph 16, Defendant admits that the due process hearing in the consolidated cases (OAH Case Nos. N2006120002/N2007010848) was held in San Diego, California before Administrative Law Judge ("ALJ") Susan Ruff on May 14-May 18, 21-25, 29-31, June 1, 11-13, 19-20, and July 11-13 and 16-20, 2007. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 16.

17. In response to paragraph 17, Defendant admits OAH issued its decision on October 3, 2007 and that the decision was served by OAH by mail on October 5, 2007. Defendant admits it received a copy of the Decision on October 8, 2007. Defendant lacks sufficient information or belief to admit or deny the date on which Plaintiffs received OAH's decision, and on that basis denies that allegation. Defendant admits that a true and correct copy of OAH's Decision was attached to Plaintiff's Amended Complaint. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 17.

18. In response to paragraph 18, Defendant admits the OAH Decision identifies 18 issues falling into four broad categories: Issues Related to Assessments; Issues Related to the August 30, 2006 Proposed IEP; Issues Related to the December 4, 2006 Proposed IEP; and Issues Related to Both IEPs. The District denies that the issues identified by OAH were the only issues litigated. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 18.

19. In response to paragraph 19, Defendant admits OAH designated T.B. as prevailing party on issues 10, 14 and 15 and designated the District as the prevailing party on all other issues in accordance with California Education Code section 56507(d). Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 19.

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FIRST CLAIM FOR RELIEF APPEALING PORTIONS OF A DECISION OF CALIFORNIA OFFICE OF ADMINISTRATIVE HEARINGS

20. In response to paragraph 20, Defendant incorporates paragraphs 1-19, inclusive, of this Answer. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 20.

21. In response to paragraph 21, Defendant admits Plaintiffs are a party aggrieved by the OAH Decision, as that term is used in 20 U.S.C. § 1415(i)(2)(A) and Education Code § 56505(k), on the issues that Plaintiffs raised and litigated at OAH and lost on. Defendant denies that the OAH Decision erred in holding in favor of the District with respect to issues 1-5 (Issues Related to Assessment); issues 6-9 (Issues Related to the August 30, 2006 Proposed IEP); issues 11-13 (Issues Related to the December 4, 2006 IEP); and issues 16-18 (Issues Related to Both IEPs). Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 21.

SECOND CLAIM FOR RELIEF FOR RECOVERY OF ATTORNEYS' FEES UNDER 20 U.S.C. § 1415(i)(3)(B)

22. In response to paragraph 22, Defendant incorporates by reference paragraphs 1-22, inclusive, of this Answer. Except as so admitted, Defendant denies each and every remaining allegation contained in paragraph 22.

23. In response to paragraph 23, Defendant denies Plaintiffs were prevailing parties in the proceeding before OAH, and on that basis denies Plaintiffs are entitled to any attorneys' fees incurred during the course of those proceedings under 20 U.S.C. § 1415(i)(3)(B). Defendant denies Plaintiffs are entitled to the attorneys' fees incurred in seeking those fees as part of their Amended Complaint.

THIRD CLAIM FOR RELIEF FOR VIOLATION OF THE IDEA

24-32. Defendant does not respond to paragraphs 24-32 of Plaintiffs' Amended Complaint because the Court dismissed this claim in its entirety on June 24, 2008. (Order, Document No. 22).

FOURTH CLAIM FOR RELIEF FOR ATTORNEYS' FEES IN CONNECTION WITH A CDE COMPLIANCE COMPLAINT

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33. In response to paragraph 33, Defendant admits Plaintiffs filed a request for compliance investigation with the California Department of Education ("CDE") on or about July 31, 2006. Defendant admits that investigation resulted in a report, but denies the report was numbered S-008-06/07. Except as admitted herein, Defendant denies each and every allegation remaining in paragraph 33.

34. In response to paragraph 34, Defendant admits CDE issued a report detailing its investigation on or around November 1, 2006. Defendant admits CDE issued amended reports on or around November 3 and November 8, 2006. Except as admitted herein, Defendant denies each and every allegation remaining in paragraph 34.

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35. In response to paragraph 35, Defendant admits the November 8, 2006 Second Amended Compliance Complaint Report found Defendant had failed to implement T.B.'s extended school year individualized education plan in some of the ways alleged by Plaintiffs. Defendant admits CDE ordered it to provide T.B. with 24 hours of missed English language arts instruction that would have been provided to the student had he remained in the District of Placement (not Defendant) and eighty minutes of adapted physical education service. Except as admitted herein, Defendant denies each and every allegation remaining in paragraph 35.

36. In response to paragraph 36, Defendant admits Plaintiffs' counsel, Steven Wyner, sent a letter to Defendant's counsel on or around October 26, 2007 demanding payment of the totality of attorneys' fees incurred by Plaintiffs in pursuing their compliance complaint. Defendant admits it has not paid the demanded amount of attorneys' fees. Except as admitted herein, Defendant denies each and every allegation remaining in paragraph 36.

37. In response to paragraph 37, Defendant denies Plaintiffs are a prevailing party pursuant Section 1415(i) of the IDEA as a result of the compliance complaint filed with CDE. Defendant denies Plaintiffs are entitled to fees incurred in the filing of a compliance complaint with the CDE. Except as admitted herein, Defendant denies each and every allegation remaining in paragraph 37.

PRAYER FOR RELIEF

38. In response to each and every prayer and relief demanded in paragraphs 38-45,

inclusive, of the Amended Complaint, Defendant denies that Plaintiff is entitled to the relief requested.

FIRST AFFIRMATIVE DEFENSE

AS A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that the Amended Complaint and each and every claim for relief therein fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that Defendant has complied with all applicable laws and regulations and therefore Plaintiffs are not entitled to any relief under the Amended Complaint or any claim for relief contained therein.

THIRD AFFIRMATIVE DEFENSE

AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that Plaintiffs have failed to exhaust their administrative remedies.

FOURTH AFFIRMATIVE DEFENSE

AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that Plaintiffs lack standing to bring their Amended Complaint.

FIFTH AFFIRMATIVE DEFENSE

AS A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that this Court lacks subject matter jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

AS A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from relief since Defendant's alleged conduct was privileged or otherwise justified as

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a matter of law.

SEVENTH AFFIRMATIVE DEFENSE

AS A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from relief sought by virtue of the doctrine of waiver.

EIGHTH AFFIRMATIVE DEFENSE

AS AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from relief sought by virtue of the doctrine of estoppel.

NINTH AFFIRMATIVE DEFENSE

AS A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from recovering the relief sought by virtue of the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

AS A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that Plaintiffs are barred and precluded from any relief in this action under and by virtue of the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

AS AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that Plaintiffs are barred and precluded from any relief in this action under and by virtue of the doctrine of consent.

TWELFTH AFFIRMATIVE DEFENSE

AS A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from recovering the relief sought as contrary to public policy or otherwise precluded by law.

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THIRTEENTH AFFIRMATIVE DEFENSE

AS A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs' claims are barred by the failure to comply with Education Code section 56505.

THIRTEENTH AFFIRMATIVE DEFENSE

AS A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from the relief sought, including all reimbursement, by virtue of statutory grounds for denial and/or limitation of reimbursement under the IDEA, including pursuant to 20 U.S.C. §§ 1412(a)(10)(C) and 1415(d)(2)(A, the IDEA's implementing regulations at sections 300.114, 300.148 and 300.502 of Title 34 of the Code of Federal Regulations, and California Education Code sections 56174, 56175, 56176, 56177, and 56329.

FOURTEENTH AFFIRMATIVE DEFENSE

AS A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs' attorneys' fees request are not reasonable or otherwise compensable under 20 U.S.C. § 1415(i).

FIFTEENTH AFFIRMATIVE DEFENSE

AS A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from relief sought by virtue of statutory grounds for denial and/or reduction of fees under the IDEA, including pursuant to 20 U.S.C. § 1415(i)(3)(C)-(F).

SIXTEENTH AFFIRMATIVE DEFENSE

AS A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from relief sought for pursuit of claims on which Plaintiffs did not prevail and that Plaintiffs' entire award should be limited to the degree of success.

SEVENTEENTH AFFIRMATIVE DEFENSE

AS A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE

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ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from recovering fees beyond the dates upon which the Defendant transmitted more favorable statutory offers of settlement pursuant to 20 U.S.C. § 1415(i)(3)(D)(i).

EIGHTEENTH AFFIRMATIVE DEFENSE

AS AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged Plaintiffs are barred and precluded from recovering fees beyond the date on which the Defendant transmits an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure.

NINETEENTH AFFIRMATIVE DEFENSE

AS A NINETEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that the OAH Decision is entitled to substantial weight and deference as to the factual and legal determinations challenged by the AMENDED COMPLAINT.

TWENTIETH AFFIRMATIVE DEFENSE

AS A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, it is alleged that each of the Plaintiffs have failed to mitigate their damages.

TWENTY-FIRST AFFIRMATIVE DEFENSE

AS A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, Defendant alleges that Plaintiffs are not entitled to a remedy because Plaintiff T.B.'s parents' actions have been unreasonable.

TWENTY-SECOND AFFIRMATIVE DEFENSE

AS A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGATIONS OF THE AMENDED COMPLAINT, Defendant alleges that the AMENDED COMPLAINT and each of its causes of action are barred, or recovery reduced, by Plaintiffs' carelessness, recklessness and/or negligence in the matters complained of in the AMENDED COMPLAINT and/or by the intervening acts of third parties.

WHEREFORE, this answering Defendant prays for a judgment as follows:

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1. That Plaintiffs take nothing by reason of their Amended Complaint;
2. That Defendant be dismissed and be awarded costs of suit incurred;
3. For attorneys' fees; and
4. For such other and further relief as the court deems just and proper.

DATED: 7-9-08

MILLER BROWN & DANNIS

By: ______________________
AMY R. LEVINE
Attorneys for Defendant
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